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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 RUTH LAFERRIERE,

Civil No. 07-364-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
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AIKEN, Judge:

Claimant, Ruth LaFerriere, brings this action pursuant to
the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying her application for disability insurance
3 benefits under Title II of the Act. For the reasons set forth
4 below, the Commissioner's decision is reversed and remanded for
5 payment of benefits.

6 **PROCEDURAL BACKGROUND**

7 Plaintiff protectively filed her applications for
8 disability insurance benefits on January 23, 2003. Tr. 63-65.
9 She alleged disability since March 3, 2001, based on depression,
10 fibromyalgia, low back pain, injuries sustained in a fall,
11 mastectomy, gallbladder surgery, and a hysterectomy. Tr. 73.
12 Plaintiff was insured throughout the relevant time period. Tr.
13 17, 66. Her application was denied initially and upon
14 reconsideration. Tr. 29-34, 37-40. An Administrative Law Judge
15 (ALJ) conducted a hearing on March 15, 2005. On May 4, 2006, the
16 ALJ issued a partially favorable decision finding that plaintiff
17 was disabled beginning March 3, 2001 through October 6, 2005.
18 Tr. 26. The ALJ found plaintiff not disabled within the meaning
19 of the Act after October 6, 2005. Id. See 42 U.S.C.

20 § 423(d)(1)(A). On January 11, 2007, the Appeals Council denied
21 plaintiff's request for review, tr. 7-9, making the ALJ's
22 decision the Commissioner's final decision. See 20 C.F.R.
23 §§ 404.981, 416.481.

24 **STATEMENT OF THE FACTS**

25 Born in 1957, plaintiff was 48 years old at the time of the
26 most recent hearing decision. Tr. 26, 63. Plaintiff completed
27 high school. Tr. 79. Plaintiff's past work included a vault
28 clerk, cashier, and cash accounting clerk. Tr. 22, 74.

1 Plaintiff last worked prior to March 3, 2001, her alleged onset
2 date. Tr. 74.

3 STANDARD OF REVIEW

4 This court must affirm the Secretary's decision if it is
5 based on proper legal standards and the findings are supported by
6 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
7 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
8 mere scintilla. It means such relevant evidence as a reasonable
9 mind might accept as adequate to support a conclusion."
10 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
11 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
12 The court must weigh "both the evidence that supports and
13 detracts from the Secretary's conclusions." Martinez v. Heckler,
14 807 F.2d 771, 772 (9th Cir. 1986).

15 The initial burden of proof rests upon the claimant to
16 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
17 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
18 an "inability to engage in any substantial gainful activity by
19 reason of any medically determinable physical or mental
20 impairment which can be expected . . . to last for a continuous
21 period of not less than 12 months. . . ." 42 U.S.C.
22 § 423(d)(1)(A).

23 The Secretary has established a multi-step sequential
24 evaluation process for determining whether a person's disability
25 has ended. See 20 C.F.R. §§ 404.1594(f), 416.994(f). This
26 multi-step process for continuing disability evaluation is
27 similar to the five-step sequential evaluation process used to
28 evaluate initial claims (outlined below), with the addition of

1 the question of whether medical improvement has occurred.

2 First the Secretary determines whether a claimant is
3 engaged in "substantial gainful activity." 20 C.F.R.
4 §§ 404.1594(f)(1), 416.994(f)(1).

5 In step two the Secretary determines whether the claimant
6 has a "medically severe impairment or combination of
7 impairments." 20 C.F.R. §§ 404.1520(d), 404.1594(f)(2),
8 416.920(d), 416.994(f)(2).

9 In step three the Secretary determines whether there has
10 been medical improvement in plaintiff's condition. 20 C.F.R. §§
11 404.1594(f)(3), 416.994(f)(3). Medical improvement is defined as
12 any decrease in the severity of the impairment that was present
13 at the time the individual was disabled or continued to be
14 disabled. 20 C.F.R. §§ 404.1594(b)(1), 416.994(b)(1). A
15 determination that there has been a decrease in medical severity
16 must be based on changes indicative of improvement in relation to
17 symptoms, signs, or laboratory findings associated with the
18 impairment. Id.

19 In step four, if there has been medical improvement, a
20 determination must be made as to whether such improvement is
21 related to plaintiff's ability to perform work, i.e., whether
22 there has been an increase in her residual functional capacity
23 based on the improvement that was present at the time of the most
24 recent favorable medical determination. 20 C.F.R. §§
25 404.1594(f)(4), 416.994(f)(4). Medical improvement is related to
26 the ability to work if there has been a decrease in the severity
27 of the impairment present at the time of the most recent medical
28 decision and an increase in the individual's functional capacity

1 to perform basic work activities. 20 C.F.R. §§ 404.1594(b)(3),
2 416.994(b)(3).

3 If it is determined that there has been no medical
4 improvement or that medical improvement is not related to
5 plaintiff's ability to work, then, at step five, consideration is
6 given to whether the case meets any of the special exceptions to
7 medical improvement for determining that disability has ceased.
8 20 C.F.R. §§ 404.1594(f)(5), 416.994(f)(5). If medical
9 improvement is shown to be related to plaintiff's ability to
10 work, then a determination will be made under step six to assess
11 whether all of plaintiff's current impairments in combination are
12 severe, i.e., whether they impose more than a minimal limitation
13 on her physical or mental ability to perform basic work
14 activities. 20 C.F.R. §§ 404.1594(f)(6), 416.994(f)(6).

15 At step seven, if plaintiff's impairment(s) are severe, the
16 ALJ must determine whether plaintiff can perform her past
17 relevant work, either as it was performed in specific settings or
18 as it is ordinarily performed in the national economy. 20 C.F.R.
19 §§ 404.1594(f)(7), 416.994(f)(7).

20 Finally, at step eight, if plaintiff cannot perform her
21 past relevant work, the burden of production then shifts to the
22 Commissioner to prove that there is alternative work in the
23 national economy that plaintiff can perform given her age,
24 education, work experience, and residual functional capacity. 20
25 C.F.R. §§ 404.1594(f)(8), 416.1594(f)(8). If plaintiff cannot
26 perform a significant number of other jobs, she remains disabled
27 despite medical improvements. If she can perform a significant
28 number of other jobs, then disability ceases. Id.

DISCUSSION

1. The ALJ's Findings

At step one, the ALJ found that plaintiff was not performing substantial gainful activity at any time relevant to the decision. Tr. 21. At step two, the ALJ found that plaintiff did not meet or equal the Listings. Tr. 21. At step three, the ALJ found significant medical improvement. Tr. 23. At step four, the ALJ found that plaintiff's medical improvement significantly improved her functional abilities relating to her ability to work. Tr. 24-25. The ALJ's findings at step three and four made it unnecessary to review step five. At step six, the ALJ determined that plaintiff had severe impairments that consisted of: degenerative disc disease, scoliosis, chronic pain syndrome, history of breast cancer with mastectomy, and adjustment disorder with depression and anxiety. Tr. 21. The ALJ determined that plaintiff had the residual functional capacity to perform sedentary work and could lift 10 pounds. Tr. 24. Finally, at step seven, the ALJ found that plaintiff could perform her past relevant work as a cash accounting clerk. Tr. 25.

2. Medical Evidence

In a continuing disability case, the ALJ must consider the severity of plaintiff's impairments at the time of the most favorable decision and, if there was medical improvement, her residual functional capacity at the time of the cessation of benefits. 20 C.F.R. §§ 404.1594(b)(7), 416.994(b)(7). Here, the comparison points are the date of plaintiff's most favorable decision, May 4, 2006, and the initial determination of cessation

1 of benefits, October 6, 2005. Tr. 26.

2 In order for the Commissioner's cessation of benefits to be
3 valid, the Commissioner must show that there has been medical
4 improvement to a substantial enough degree that plaintiff is no
5 longer disabled. 20 C.F.R. § 404.1594. Medical improvement must
6 be demonstrated by a decrease in medical severity that is based
7 on improvements in the symptoms, signs, or medical findings
8 associated with the impairments. Id.

9 In the ALJ's decision dated May 4, 2006, the ALJ found
10 plaintiff suffered from the following severe impairments:
11 degenerative disc disease, scoliosis, chronic pain syndrome,
12 history of breast cancer with mastectomy, and an adjustment
13 disorder with depression and anxiety. Tr. 21. The ALJ found
14 that from March 3, 2001, through October 5, 2005, plaintiff had
15 the residual functional capacity:

16 to lift 10 pounds occasionally and less than 10
17 pounds frequently. She could stand and
18 work 2 hours of an 8-hour day and sit
19 about 6 hours out of an 8-hour day. She
20 was limited to occasional overhead pushing,
21 pulling and reaching with left upper extremity.
22 She was limited to frequent, not constant,
23 handling and fingering. She could
24 occasionally climb, stoop, crouch and crawl.
25 She could frequently balance and kneel. She
26 should avoid concentrated exposure to extreme
27 heat, humidity and vibration. She was limited
28 to simple, routine, 1-2 step tasks. She would
miss 2 or more days of work per month.

Id.

The ALJ reasoned that:

From March 3, 2001, through October 5, 2005, the
claimant's statements concerning the limiting
effects of her symptoms are generally credible.
The claimant sustained multiple injuries in a
motor vehicle accident on March 3, 2001. She

1 required surgical repair of a mandible fracture.
2 X-rays revealed degenerative disc disease of
3 the cervical spine at C6-7 but no fractures
4 (Exhibit 1F). She continued to complain of pain
5 due to muscle strains. She underwent physical
6 therapy as well as treatment with Vicodin, Flexiril
7 and Ibuprofen (Exhibit 4F). She exhibited some of
8 the trigger points associated with fibromyalgia
9 in a March 2002 rheumatology evaluation, but not
10 enough to confirm the diagnosis. She was also
11 noted to suffer from marked scoliosis (Exhibit 14F-188).
12 In September 2002 the claimant underwent a left
13 mastectomy for breast cancer (Exhibit 12F-160). In
14 May 2003 she reported persistent pain at the incision
15 site for the mastectomy. Charles May, MD, a treating
16 rheumatologist, indicated in May 2003 that she would
17 likely be disabled for 2 to 3 years due to her
18 multiple medical problems but that she might eventually
19 be able to return to work (Exhibit 14F-193). At
20 an April 2003 psychological evaluation the claimant
21 was diagnosed with an adjustment disorder with mixed
22 anxiety and depressed mood (Exhibit 13F). Kate Morris,
23 Ph.D., a treating psychologist, opined in
24 November 2003 that claimant would be disabled for
25 at least 1 to 2 years due to her multiple conditions
26 (Exhibit 26F-265). Robin Chandler, M.D., a treating
27 physician, opined in October 2003 that claimant's
28 emotional and physical status would not enable her
to work (Exhibit 29F-291). Mayda Ramos, M.D., another
treating physician, opined in October 2004 that claimant
was unable to work due to her marked scoliosis and
psychiatric disorder resulting in difficulty with
concentration and difficulty interacting with others
(Exhibit 30F-317). Ms. LaFerriere underwent extensive
surgery for progressive scoliosis on April 18, 2005
(Exhibit 31F-342). The opinions of the claimant's
treating physicians are consistent with the treatment
record and are given significant weight. The opinions
of the State agency consultants have been considered.
However, greater weight is given to the opinions of
the claimant's treating physicians, who have opined
the claimant was unable to work.

Tr. 22.

Given the above residual functional capacity, the ALJ
found that plaintiff could not perform her past work as well as
any other work in the national economy. Tr. 22-23. This
finding was based, in part, on the testimony of the VE at the
March 15, 2005, hearing. Tr. 23-24, 556-58.

1 The ALJ then reasoned that "medical improvement occurred
2 as of October 6, 200[5], the date the claimant's disability
3 ended." Tr. 23. The ALJ found that plaintiff "experienced
4 improvement in her symptoms following recovery from her surgery
5 for scoliosis. In July 2005 she reported less pain and
6 indicated she was feeling much better overall. On October 5,
7 2005, she reported continued improvement but indicated she
8 continued to have some pain. On October 11, 2005, she reported
9 she was doing better and was decreasing her use of Oxycontin
10 and Oxycodone." Tr. 23-24 (internal citations omitted).

11 Plaintiff relies on treating physician Chandler's opinion
12 dated October 21, 2003, that plaintiff has multiple medical and
13 psychological issues. Tr. 456. Dr. Chandler noted plaintiff
14 "had an MVA with head injury," history of breast cancer,
15 chronic pain, fibromyalgia and chronic fatigue. Id. He also
16 noted her scoliosis with recommendations for surgery and a new
17 diagnosis of osteoporosis. Id. Dr. Chandler concluded: "the
18 patient is, in my opinion, disabled. Her emotional and
19 physical status do not enable her to work in any job whatsoever
20 at this time. She would not be able to physically or
21 emotionally handle a job. I do not see this improving in the
22 foreseeable future." Id. (emphasis added).

23 Plaintiff next points to the testimony of Dr. Robert
24 Bigley who testified as an expert witness for the Social
25 Security Administration. Tr. 553. Dr. Bigley testified that
26 due to chronic pain syndrome, depression and anxiety, and the
27 many surgeries plaintiff had undergone, plaintiff had "marked
28 limitations in the ability to concentrate, persist and stay on

1 pace." Tr. 554. The ALJ recognized and credited Dr. Bigley's
2 testimony. Tr. 21. Yet, the ALJ found that after October 6,
3 2005, plaintiff was limited to lifting 10 pounds, standing and
4 walking 2 hours out of an 8-hour workday and sitting 6 hours in
5 an 8-hour workday with no limitations in the ability to
6 concentrate and persist and stay on pace. Tr. 24. During her
7 period of disability, Dr. Kallemeyn similarly found plaintiff
8 had significant problems persisting with tasks. Tr. 343. The
9 record supports plaintiff's position that she continued to have
10 marked limitations in the ability to concentrate, persist and
11 stay on task from October 6, 2005, onward.

12 Moreover, there is evidence in the record that as of April
13 18, 2005, Dr. Keenan noted that plaintiff is "overall doing
14 better than before, but continues to have some pain as noted."
15 Tr. 490. Dr. Keenan also wrote, "activities are discussed.
16 All questions are answered." Tr. 490. The record fails to
17 specify what activities were discussed. However, plaintiff
18 testified at the hearing that both Drs. Keenan and Christian
19 advised her not to return to work. Tr. 546. She also
20 testified that her doctors limited her to not lifting more than
21 a gallon of milk and to hold it close to her body when lifting.
22 Tr. 547. Plaintiff's testimony was not refuted by the ALJ, or
23 anywhere else in the record. Further, notes from plaintiff's
24 surgery dated April 5, 2005, indicated a two year recovery
25 period was expected. Tr. 451. Also, as early as one year
26 before the date plaintiff was found not disabled, she was still
27 experiencing "severe anxiety and depression, aggravated also by
28 pain." Tr. 466. On November 2, 2005, plaintiff was still

1 being prescribed both Oxycontin and Oxycodone for pain with an
2 increase in her Elavil for sleep problems. Tr. 459. On
3 December 6, 2005, FNP Roberts noted that plaintiff "has been
4 taking a lot of pain medicine. She says she can feel the pain
5 over the medication, as well as she can also feel her back pain
6 even through the pain medicine that she is taking." Tr. 458.
7 At the hearing, plaintiff testified that she "feels achy all
8 over, like flu-like achiness." Tr. 534. She experiences daily
9 back pain. Tr. 535. She continues to experience extreme pain
10 and needs to lay down a lot. It takes her longer to do things.
11 Tr. 548, 540. She testified that although she is no longer
12 taking Oxycontin she continues to take Oxycodone. Tr. 539.
13 Finally, plaintiff testified that she has some nerve damage in
14 her mastectomy site and the site aches. Tr. 544. This
15 evidence in the record, when reviewed in its entirety, is not
16 consistent with nor does it support the ALJ's significant
17 increase in plaintiff's residual functional capacity such that
18 plaintiff is now able to work full-time due to medical
19 improvements.

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1 **CONCLUSION**

2 The Commissioner's decision is not based on substantial
3 evidence. Therefore, this case is reversed and remanded for
4 payment of benefits. This case is dismissed.

5 IT IS SO ORDERED.

6 Dated this 4 day of June 2008.

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10 /s/ Ann Aiken

11 Ann Aiken
12 United States District Judge
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